BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEGGETT & PLATT, INC.	:		
and	:	Case Nos.	09-CA-194057 09-CA-196426
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (IAM), AFL-CIO	:		09-CA-196608

ANSWERING BRIEF OF CHARGING PARTY INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS TO THE EXCEPTIONS OF RESPONDENT LEGGETT & PLATT, INC.

INTRODUCTION

Respondent Leggett & Platt, Inc. ("Employer") excepts to the proposed decision of Administrative Law Judge Andrew S. Golin and asserts, *inter* alia, that Judge Golin's decision is not supported by the record evidence or, alternatively, that the Board should overturn the doctrine set forth in *Levitz Furniture Company of the Pacific, Inc*., 333 NLRB 717 (2001), which held that "an employer may unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of the majority of the bargaining unit employees." The Charging Party, International Association of Machinists and Aerospace Workers ("Union") hereby answers those exceptions and respectfully requests that they be overruled and that Judge Golin's well-reasoned and supported decision be adopted by the Board. [1]

[1] The Union hereby adopts and incorporates by reference the General Counsel's answering brief in response to the Employer's exceptions, and also joins in the General Counsel's partial exceptions. Rather than burdening the Board here with argument and citations which would be duplicative of those submitted by the General Counsel, the Union instead focuses this brief only upon the most salient issues presented – that is, the evidence supporting Judge Golin's decision, and the reasons why the Employer's suggestion to overturn *Levitz Furniture* should be rejected.

Contrary to the Employer's assertions, the proposed decision is amply supported by record evidence, which unequivocally demonstrates that, as of March 1, 2017, the date that the Employer withdrew recognition, the objective evidence did *not* support the conclusion that the Union had lost majority support. Under *Levitz Furniture*, such evidence required Judge Golin to find a violation of the Act, because *Levitz* expressly mandates that an employer which chooses to withdraw recognition "can defeat a postwithdrawal refusal to bargain allegation if it shows, as a defense, the union's actual loss of majority status." *Id.*

Faced with overwhelming evidence in support of the proposed decision, the Employer asserts, in the alternative, that the Board should revisit, and overturn, *Levitz Furniture* as the controlling precedent in withdrawal-of-recognition cases. This suggestion, to overturn long-settled precedent, is unavailing, particularly since the Employer's proposed alternative would require unions to disclose the identity of its supporters, thereby exposing them to the likelihood of retaliation. The Employer's exceptions, therefore, should be overruled and the proposed decision should be adopted.

STATEMENT OF THE CASE

Procedural History. This case arose out of unfair labor practice charges filed by the Union on March 1st and April 6th and 10th, 2017, upon which a complaint, and subsequently a second, consolidated complaint, were issued by Region Nine. The case was tried in Mount Sterling, Kentucky, before Judge Golin on July 24th through the 26th, 2017. Following the submission of briefs by all parties, Judge Golin issued a proposed decision on October 2, 2017, in which he found the Employer, *inter alia*, to have unlawfully withdrawn recognition from the

Union. He also issued a proposed order mandating that the Employer recognize the Union and also providing for other relief. The Employer filed timely exceptions from the proposed decision, along with a supporting brief, and the General Counsel also filed limited exceptions. The matter now comes before the Board on those exceptions.

Factual Background. The Union has been the collective-bargaining representative at the Employer's Winchester, Kentucky, mattress factory since 1965. (Cons.Complaint ¶6a; R's Answer thereto ¶6a.) During those 52 years, the Union and Employer have been parties to a series of collective bargaining agreements, the most recent of which expired on February 28, 2017. (*Id.* at ¶7a; Joint Ex. 1.)

Charles Denisio is the Employer's General Manager and the top manager at the Winchester facility. (Tr.199:1.) In December 2016, Keith Purvis, a member of the bargaining unit, presented Mr. Denisio with a multi-page document, each page of which was entitled "Employee Petition for Union Decertication" and bore the printed heading "[t]he undersigned employees of Leggett and Platt #002 do not want to be represented by IAM 619 hereafter referred to as "union." (Tr.227-9-16; R.Ex. 7.) At that time, the document bore the signatures of 159 bargaining-unit members. (Tr.235:21-25.) Subsequently, Mr. Purvis provided Mr. Denisio with additional pages bearing the same heading and bearing additional signatures (Tr.228:19-229:13).

Following a process initiated by Mr. Denisio to verify the authenticity of the signatures, Mr. Denisio determined that the Union no longer had the support of a majority of the employees

in the bargaining unit, and he notified the Union that the Employer would be withdrawing recognition following the expiration of the CBA on February 28, 2017. (Joint Ex.4.) On March 1, 2017, after the CBA had actually expired, Mr. Denisio ascertained that there were 295 employees in the bargaining unit. (Tr.252:17-25; Joint Ex.8.) As of that date, the signatures presented to him on the "anti-union" petition totaled 167 (Tr.236:2); Mr. Denisio therefore determined that the Union lacked majority support, and he confirmed to the Union in writing that the Employer was withdrawing recognition. (Joint Ex.9.)

Meanwhile, the Union had responded to the Employer's announcement that it would be withdrawing recognition by engaging in its own petition campaign. The Union staffed its office in downtown Winchester for 24 hours on January 18, 2017, at which attendees were able to sign a document (of multiple identical pages) which bore the printed heading "We the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc." (Tr.101:2-103:6; G.C. Ex. 2.)[2] Most of the signatures on "pro-union" petition were obtained on that date, while some were obtained on subsequent dates up to, and including, February 28th. (G.C. Ex.2.) As of February 28, 2017, the day that the CBA expired and the day before the Employer withdrew recognition, the pro-union petition contained the signatures of 28 bargaining-unit members who had previously signed the anti-union petition. *Id.*

[2] All pages of the document eventually assembled as G.C. Ex. 2 – the "pro-union" petition, bore this pre-printed heading before any signatures were obtained. (Tr.71:17-18:21.)

ARGUMENT

THE EMPLOYER UNLAWFULLY WITHDREW RECOGNITION BECAUSE, AS OF MARCH 1, 2017, THE OBJECTIVE EVIDENCE SHOWED MAJORITY SUPPORT FOR THE UNION.

A. The Employer Failed to Meet its Burden of Proving an Actual Loss of Majority Support for the Union.

For sixteen years, *Levitz* has unequivocally controlled the circumstances upon which an employer may unilaterally withdraw recognition from the incumbent collective bargaining representative of its employees. Prior to 2001 (when *Levitz* was decided), such situations were controlled by *Celanese Corp*., 95 NLRB 664 (1951), which permitted an employer to unilaterally withdraw recognition so long as it could demonstrate "good-faith doubt, based on objective considerations, of the union's continued majority status." *Levitz* 333 NLRB at 717. In *Levitz*, the Board engaged in a detailed review of that standard and the applicable policy considerations, and decided to jettison the *Celanese* rule. In explaining its new standard, the *Levitz* Board declared that, "[i]n our view, there is no basis in either law or policy for allowing an employer to withdraw recognition from an incumbent union that retains the support of a majority of the unit employees, even on a good-faith belief that majority support has been lost. Accordingly, we shall no longer allow an employer to withdraw recognition unless it can prove that an incumbent union has, in fact, lost majority support." *Id.* at 723.

In the instant matter, the Union-represented bargaining unit had 295 members as of March 1, 2017. (Tr.252:17-25.) On that date, the Employer had in its possession the "anti-union" petition (R. Ex.7) which contained 167 signatures, more than half of the bargaining unit. Thus, as of March 1st, the Employer certainly had sufficient evidence to support "good-faith doubt" of the Union's majority status, and its withdrawal of recognition would have been lawful

under *Celanese*. Unfortunately for the Employer, however, *Celanese* had long been overruled, to be replaced by *Levitz*, which unequivocally imposes the burden upon such employers of proving *actual loss* of support for the union (and not just proof sufficient to form a basis for "good faith doubt").

In fact, as of March 1st, the Union had compiled its own competing "pro-union" petition (G.C. Ex. 2), which contained the signatures of 28 individuals who had previously signed the Employer's anti-union petition. Since all of these "cross-signers" signed the "pro-union" petition *after* they had signed R. Ex. 7, their signatures on the pro-union petition had the effect of nullifying their signatures on the anti-union petition. The General Counsel presented the "pro-union" petition (supported by the appropriate authenticating testimony) as G.C. Ex. 2 in support of its case. Thus the record evidence demonstrates that, as of the date that the Employer withdrew recognition, only 139 of the 295 (approximately 47%) members of the bargaining unit had demonstrated their lack of support for the Union.

Under the rule of *Levitz*, the General Counsel in the instant matter has presented evidence demonstrating that the Union had *not* lost majority support at the time the Employer withdrew recognition. The Employer has not rebutted this evidence. Such a circumstance was expressly envisioned by the *Levitz* Board, which held that "[a]n employer who presents evidence that, at the time it withdrew recognition, the union had lost majority support should ordinarily prevail in an 8(a)(5) case if the General Counsel does not come forward with evidence rebutting the employer's evidence. If the General Counsel does present such evidence, then the burden

remains on the employer to establish loss of majority support by a preponderance of all the evidence." *Levitz*, 333 NLRB at 725, n49.

The burden remains upon the Employer to present evidence of *actual loss* of majority support by the Union as of the date that it chose to withdraw recognition. It has failed to meet this burden. Judge Golin, therefore, properly found the Employer to have violated Section 8(a)(5) of the Act when it acted unilaterally to withdraw recognition from the Union on March 1, 2017, at a time when the Union still held the support of the majority of the employees in the bargaining unit.

B. The Union's Failure to Disclose its Evidence of Support does not Absolve the Employer of its Duty of Proving Actual Loss of Support for the Union.

Aware of its abject failure to meet its burden of showing actual loss of majority support for the Union, the Employer tries to craft an argument whereby it is absolved of its burden. In his opening argument at the hearing of this matter, counsel for the Employer argued that "the General Counsel and the Union are engaged in a game of "gotcha" by relying on a previously undisclosed petition to attack the sufficiency of the decertification petition on which Leggett relied to withdraw recognition, something that members of the Board and the D.C. Circuit have criticized in cases like Scomas of Sausalito, Parkwood Development Center, and the like." (Tr.53:15-21.) In other words, the Employer argues that the Union had an obligation to disclose its "pro-union" petition to the Employer prior to the announced withdrawal of recognition, and that its failure to do so somehow excuses the Employer from liability for withdrawing recognition.

This argument was anticipated, and expressly rejected, by the *Levitz* Board:

> We emphasize that an employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. If it fails to do so, it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5).

333 NLRB at 725 (footnote omitted). While placing this un-shifting burden on employers, the Board also preserved an avenues for employers to avoid legal jeopardy by continuing to allow employers to file RM petitions upon a simple showing of "reasonable good-faith uncertainty as to incumbent unions' continued majority status." *Id.* at 723 (fn omitted). Thus, the Employer in the instant matter could have easily avoided legal jeopardy when, upon being presented with the anti-union petition, it had simply filed an RM petition. It chose not to do so, and it now must face the consequences.

The cases cited by Employer counsel, *Scomas of Sausalito*, 362 NLRB No. 175 (2015), and *Parkwood Developmental Center*, 347 NLRB 974, 975 (2006) do nothing to alter this conclusion. In both of these cases, one of the Board members on the panel added concurring footnotes suggesting that the Board should revise *Levitz* to require that "that unions present evidence of reacquired majority support within a reasonable amount of time (after the employer's announced withdrawal of support)[.]" *Scomas*, n.2; *Parkwood*, n.8. In neither case, however, did a majority of the Board adopt this view, so neither case altered the *Levitz* standard. The law applicable to this case, therefore, did not impose any requirement upon the Union to disclose its "pro-union" petition and the Employer is not absolved of its burden of proving an actual loss of majority support.

Nor is the change proposed by the Employer persuasive as a policy matter: requiring unions to disclose their evidence of support to employers in this type of situation would be manifestly unwise, as it would expose individuals *within* the bargaining unit who expressed support for the union to possible pressure, or even retaliation, by their employer. The present rule, as enunciated by *Levitz* Furniture, by contrast, protects unit members from such pressure. Nor, contrary to the Employer's assertion, does the present rule allow unions to play "gotcha." To the contrary, the rule of *Levitz Furniture* explicitly warns employers that they withdraw recognition for the bargaining agent at their own peril, and also provides them with the trouble-free alternative of filing an RM petition instead.

ALJ Golin appropriately applied the rule of *Levitz Furniture* to the clear facts of this case and properly found the Employer to have violated Section 8(a)(5) by unilaterally withdrawing recognition at a time when the objective evidence demonstrated that the Union had not, in fact, lost majority support. The proposed decision and order, therefore, should be affirmed and adopted, and the Employer's exceptions therefrom should be overruled.

C. There is No Evidence that any Employees Were "Misled" into Signing the Pro-Union Petition.

At the hearing of this matter, the Employer's counsel argued that "the evidence in this case will show that at least 10 of the employees who signed both the pro-union and decertification petition were misled into signing the pro-union petition and/or actually supported

the decertification of the Union as of March 1." (Tr.53:22-16:1.) The record evidence, as actually compiled, shows no such thing. To the contrary, General Counsel Ex. 2 demonstrates that each and every page of the "pro-union" petition bore a pre-printed heading stating "[w]e the undersigned members of the International Association of Machinists and Aerospace Workers, Local Lodge 619, support the Union at Leggett & Platt, Inc." *See also* Tr.71:17-18:21. There is no evidence to suggest that any signatory to the "pro-union" petition was somehow "misled" by this heading, nor could there be. Rather, the Employer presented a long series of witnesses, all of them "cross-signers," who presented remarkably similar testimony to the effect that they all went on their own time to the Union's office in downtown Winchester only to find themselves signing a document without ascertaining what it was they were signing. None claimed that they were given misleading information by the Union. None contradicted the plain explanation for the "pro-union" petition given by its own heading. Fairly typical of their testimony is that presented by Brian Patrick, the substance of whose testimony was fairly summarized during cross examination:

Q BY MR. HALLER: Mr. Patrick, this union meeting was at the union office -- the union hall. Right?
A. Yes.
Q. You went on your own time. Didn't you?
A. Yes. After work. Yes, sir.
Q. After work. You drove downtown to go to this meeting. Didn't you?
A. Yes.
Q. You got in line and you signed a piece of paper without looking at what it said. Didn't you?
A. Yes. I did.

(Tr.597:18-598:3.)

Such testimony is completely devoid of any evidence that the Union "misled" anyone into signing the "pro-union" petition, and does nothing to rebut the evidence of that petition showing that a majority of the bargaining unit supported the Union as of March 1, 2017. The

Employer, therefore, was properly found liable for violating Section 8(a)(5) of the Act when it unilaterally withdrew recognition from the Union on that date.

CONCLUSION

For all of the above-stated reasons, the proposed decision and order of Judge Golin should be affirmed and adopted, and the Employer's exceptions therefrom should be overruled.

Respectfully submitted,

IAMAW LEGAL DEPARTMENT

By: /s/

William H. Haller
ASSOCIATE GENERAL COUNSEL
9000 Machinists Place
Upper Marlboro, MD 20772
(301) 967-4510
whaller@iamaw.org

Counsel for Charging Party

Dated: November 20, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served, via electronic transmission, true and correct copies of the foregoing brief and upon:

Counsel for Respondent:

Arthur T. Carter, Esq.
atcarter@littler.com

A. John Harper III, Esq.
ajharper@littler.com

Counsel for the General Counsel:
Zuzana Murarova, Esq.
zuzana.murarova@nlrb.gov

/s/
William H. Haller

Dated: November 20, 2017